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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-99

HOWARD S. SPERING, *Petitioner*

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

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October 13, 1971

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SPERING'S CLAIMS SHOULD BE RECOGNIZED OR ASSUMED TO HAVE SUBSTANTIAL MERIT AT THIS PRETRIAL STAGE

A. SPERING'S VITAL ROLE IN CREATION OF RESPONDENT AND IN SUSTAINING ITS BUSINESS LIFE IS UNCONTRADICTED IN THE RECORD.

Respondent's (TB&C's) Brief in Opposition repeatedly seeks to challenge the merit of Spering's case, while disregarding all of Spering's sworn testimony given at his deposition taken by TB&C's attorneys, that stands wholly *uncontradicted* on the record by testi-

mony of any other witness. That testimony recites in detail the basic background and key relationship of Spering to the creation and development of the substantial industrial plant project, which became TB&C. It also reviews his continuing services that were vital to the company's business life under contracts with the Department of Defense, and that provided $112,000,000, or nearly 60 percent of TB&C's gross receipts throughout its life.

1. Respondent's Attorneys Seek Unfairly and Falsely To Conceal Spering's Vital Role and True Perspective of His Underlying Relationship to Respondent

The Transcript of Spering's said testimony, Docket # 32, taken by TB&C's attorneys on August 12, 1965, was inexplicably withheld from the record in the District Court, and presumably from the Judges of said Court, *for nearly three years* until May 3, 1968. But Spering received a copy of that transcript from his former attorney on September 15, 1965, paid the Court reporter for it directly on October 29, 1965, and provided copies of his corrections of it to his attorney before his later deposition was taken on December 30, 1965. Yet the transcript of that later deposition was promptly filed and became a part of the record on January 27, 1966.

Statements in the lower portion of page 7 of TB&C's attorneys' Brief seek to give the *wholly false* and *erroneous* impression that TB&C had already commenced activities and was in operation in 1954 when Spering commenced his services in the interest of the project in March 1954. Contrary to this, TB&C was not even incorporated until Spering insisted in July 1954 that a corporate entity should be created with some substantial owners of its initial pro forma com-

mon stock before he would submit the original proposal to Government for a contract that was to form the foundation for financing the construction and operation of plant facilities and the commencement of a business. That *birth-giving contract* was not executed until *a year later in July 1955!*

Also contrary to their statement, TB&C did *not have nine years of operation.* It had no plant facilities with which to commence any operations until February 1957 and it sold those facilities *five years later* in July 1962, not in 1963. Moreover, it did not even have any organization of personnel capable of operating a plant or producing and selling any product until shortly before February 1957, almost three years after Spering's efforts started in March 1954.

This perspective on the relationship of Spering to the creation and development of an operating going-concern, that was only a gleam in the eye of Robert L. Purvin in March 1954, has been cunningly concealed from the Court's view in TB&C's Brief. That perspective is necessary to bring into focus in its proper light Spering's letter dated March 26, 1954 to Mr. Purvin, which is Appendix A to TB&C's Brief. It merely recites a willingness to collaborate with Purvin on a very *preliminary* basis believed best suited to the requirements of striving to develop the project, as it stood *at that time.* It was not submitted to be signed as a written agreement, and was not signed or otherwise accepted in writing by Purvin.

Neither Purvin nor Spering *at that time* knew whether or when such a project could be developed, or even whether Purvin could get anyone to pay Spering on a current basis at the low support-level rate that he required. As a consequence, no written agreement was

made between them. Spering nevertheless proceeded actively with Purvin and design engineers to develop a plant project and then to prepare the proposal to Government, in reliance upon the basic oral understanding with Purvin for ultimate compensation to be paid to Spering based on the fair value of his services in relation to the success that might be achieved with the project.

Purvin had originally proposed that Spering serve, as Purvin was doing, without any current support-level compensation and depend entirely on the ultimate compensation based on the fair value of Spering's services and the success of the project. Spering agreed to gamble on ultimate compensation, but pointed out that he had to have some minimum support-level compensation if he was to devote the large amount of time that would be required. This was the basic understanding with Purvin. See pages 83 through 87 of Spering's first deposition, Docket # 32. This was confirmed by Purvin on a number of significant occasions in later years, as specified in detail, with references to testimony, in Appellant's Reply Brief in the Court of Appeals.

2. Letters From Officer-Director-Stockholders Evidence Spering's Decisive Part in Creation of Respondent

Spering devoted more than 190 days of recorded service time in the first sixteen month period from April 1954 through July 1955 when the $15,000,000 Facilities Investment Underwriting Contract that he negotiated was finally executed by Government. Because of conflict of interest Spering had to forego other substantial retainer relationships during that period and in subsequent years. See pages 53 through 55 and page 97 of Spering's first deposition, Docket # 32.

That Spering's services *were decisive in giving birth* to TB&C's construction of plant facilities and eventual business operations is clearly evidenced and acknowledged in three letters attached hereto as Appendix I, II, and III, that Spering received from officers of TB&C's two primary stockholders, Godfrey L. Cabot, Inc. and Carl M. Loeb, Rhoades & Co., that together owned 89% of its voting stock and continue to be the controlling stockholders: I—dated July 19, 1955 from Russell G. Allen, then Executive Vice President of Godfrey L. Cabot, Inc.; II—dated July 25, 1955 from Louis W. Cabot, then Vice President of Godfrey L. Cabot, Inc. (now Chairman of the Board of Cabot Corporation, its successor name); and III—dated March 12, 1957 from Mark Millard, then and now a senior partner in Carl M. Loeb, Rhoades & Co. Messrs. Cabot and Millard were vice presidents and directors of TB&C in July 1955 and were directors at all times. See also pages 56 through 61 of Spering's first deposition, Docket # 32, for Spering's salvaging the project after all others had given up in March 1955.

B. RESPONDENT'S ATTORNEYS IGNORE THE FACT THAT NO WRITTEN OR OTHER AGREEMENT EXISTED FOR THE SECOND PERIOD RENEGOTIATION WORK OTHER THAN A LAWYER'S RECOGNIZED RIGHT TO COMPENSATION FOR THE FAIR VALUE OF HIS SERVICES UNDER CANON 12.

TB&C's Brief totally ignores the fact that there was no written agreement of any kind nor any other understanding discussed by Spering with TB&C with respect to his *second period* of service, having to do with the renegotiation proceedings in 1963 and 1964. For these services Spering claims, and believes, he is clearly entitled to full compensation based on the "fair value" of his services to TB&C in accordance with Canon 12 of the Canons of the American Bar Associa-

tion. He not only brought unique knowledge and ability into those renegotiation proceedings by reason of his comprehensive background in TB&C's affairs involved therein, but he also *had to assume full responsibility* for all decisions in connection with the proceedings and for locating from the company's files, then in storage boxes, all the relevant economic and accounting records needed to respond fully and effectively to all matters challenged by the Renegotiation Boards, regional and national.

Respondent's attorneys on page 9 of their Brief repeat the misleading statement that "Spering concluded all of his services for TB&C shortly after his July 31, 1964 billing" and "instead of sending a final bill, submitted a bill in November 1964". They thus persist in seeking to create the same *false* impression that Spering did not bill TB&C "until nearly four months later" asserted in their brief before the Court of Appeals. The *truth clearly shown* in Defendant's Exhibit # 4, identified at page 119 of Spering's first deposition, is that from July 26, 1964 through October 26, 1964 Spering devoted 150 hours of recorded service time, more than 28% of his total time of 527 hours engaged in the renegotiation work in the period from June 1963 through October 1964. The record is clear that Spering's final statement was promptly issued November 11, 1964. See Defendant's Exhibit # 1 identified at page 108 of Spering's aforesaid first deposition.

The final complete clearance of TB&C issued by the national Renegotiation Board on October 15, 1964, with *no payment* of any amount to Government, was an outstanding success that might not otherwise have been achieved in the face of the national Board's charges of a "windfall".

C. DISTRICT COURT AND COURT OF APPEALS ASSUMED VALIDITY AND SUBSTANTIAL MERIT OF SPERING'S CLAIMS.

Contrary to TB&C's Brief seeking to challenge the merit of Spering's case, Chief Judge Wright in the District Court declared, at the hearing October 16, 1969 on whether to vacate the order of dismissal of Spering's case, "I am assuming for the purpose of this argument that *you have a legitimate claim* for the purpose of this argument". Also, the Court of Appeals in its Opinion, page 2a of the Petition for a Writ of Certiorari herein, declared "We do so mindful that appellant's claim might ultimately have had some *substantial merit.*" (Emphasis supplied in both quotations).

D. COMPENSATION TO PETITIONER FROM RESPONDENT ON A TIME BASIS AVERAGED MUCH LESS THAN FROM OTHER CLIENTS IN THE SAME PERIOD, AND THUS CORROBORATES SPERING'S BASIC UNDERSTANDING THAT HE WOULD RECEIVE ULTIMATE FAIR VALUE COMPENSATION.

Spering's Answers to Interrogatories submitted by TB&C's attorneys required him to review and report on essentially all fees, time of service, and fee arrangements that he had with each of his other clients in the 11-year period from January 1954 to the end of 1964. The District Court and TB&C's attorneys regarded this information and the amounts of fair-value fees paid to Spering by others as highly relevant to the validity and magnitude of Spering's claims against TB&C. For this reason the District Court required Spering to respond to those Interrogatories, over objections raised by his attorneys on the ground that it was unduly burdensome. Spering thus was compelled to devote more than twenty full days to ferreting out the information and preparing the Answers.

Those Answers and Defendant's Exhibit # 3, identified at page 119 of Spering's said first deposition, establish:

(a) that Client D paid Spering a total of $46,000.00 for his services from January 1955 through September 1957 on a "fair value" basis, that constituted compensation on a time basis equivalent to $414.00 per day using 8 hours of recorded service time as a day;

(b) that Client W paid Spering a total of $36,576.00 for his services from May 1960 through October 1965 on a "fair value" basis, that constituted compensation on a time basis equivalent to $459.00 per day using 8 hours of recorded service time as a day;

(c) that if TB&C paid Spering at that $459.00 per day "fair value" rate for the 851 days of his services for it in the first period from April 1954 through July 1962, its compensation to Spering *for that first period alone* should have been $390,609.00, or $242,111.00 more than the $148,498.00 that it paid Spering for that period;

(d) that, after allocating all of his business expenses to his clients on the basis of the time devoted to services for the respective clients in the total period from 1954 through 1964, the average *net* compensation per day from *all other* of his clients was $170.88 per day for a total of $205,575.00; and

(e) that, after allocating all of his business expenses to clients on the same time basis for the same 11-year period, the average *net* compensation per day from *TB&C* was only $100.36 per day for a total of $91,784.00;

The data therefore show that at no time in the first period of eight and one-third years of his services did

TB&C compensate Spering in any amounts competitive with or even approaching the "fair value" compensation computed to a per day basis that he received from some other clients for his services within the same period. Incidentally, those clients also paid support fees on a current basis, and a final "fair value" amount. The data also show that even the average *net* compensation per day that Spering received from TB&C over the total of the two periods of his services was substantially below (only 59% of) the average *net* compensation that he received from *all other* of his clients over the same total period.

These data thus *fully corroborate* the fact that *TB&C's compensation to Spering,* throughout both periods of his services was *at support-level per diem rates* only, and *below the levels of actual compensation* he received *from others.* This was in accordance with his basic understanding, that he would be ultimately compensated by TB&C on the basis of the real value of his services to the project to be determined in the light of the success of the undertaking when the measure of its success and his contributions to it could be determined and such "fair value" compensation could be readily paid.

CONCLUSION

For the foregoing reasons the validity and substantial merit of Spering's claims against TB&C in these proceedings should be recognized, or at least should be assumed without question, by this honorable Court for the purpose of its consideration of Spering's Petition for a Writ of Certiorari. A writ of certiorari should therefore issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

HOWARD S. SPERING
1000 Connecticut Avenue
Washington, D. C. 20036
Telephone: (202) 659-1777
Attorney for Petitioner
Acting for Himself

October 13, 1971

APPENDIX I

GODFREY L. CABOT, INC.
77 FRANKLIN STREET
BOSTON 10, MASSACHUSETTS

TELEPHONE: LIBERTY 2-7300
CABLE ADDRESS
CHANDERYAR, BOSTON

July 19, 1955

Mr. Howard S. Spering
1518 K Street, Northwest
Washington 5, D. C.

Dear Howard:

Congratulations to you on the successful outcome of the work with ASPPA.

We are all very proud to have you as a member of the team, not only because of the results you can obtain, but no less importantly because of your manner of operation.

Sincerely yours,

/s/ Russ
R. G. Allen

RGA:bg

APPENDIX II

GODFREY L. CABOT, INC.
77 FRANKLIN STREET
BOSTON 10, MASSACHUSETTS

TELEPHONE: LIBERTY 2-7300
CABLE ADDRESS
CHANDERYAR, BOSTON

July 25, 1955

Mr. Howard S. Spering
1518 K Street, Northwest
Washington 5, D. C.

Dear Howard:

Although I have been away on vacation for the past two weeks I have kept up to date on the progress of TB&C. Now that I am back I want to take the opportunity of complimenting you on the successful completion of our agreement with ASPPA. More than that! I know you are responsible for the initial conception of this whole arrangement which I feel sure will handsomely serve the best interests both of our nation and of those who risked their money in the project.

It has been a privilege to work with you.

Sincerely,

/s/ Louis
Louis W. Cabot
Vice President

LWC:es

APPENDIX III

CARL M. LOEB, RHOADES & CO.
42 WALL STREET
NEW YORK

New York 5
March 12, 1957

Mr. Howard S. Spering
1518 K Street, Northwest
Washington 5, D. C.

Dear Howard:

Many thanks for your letter of March 8. I agree with you that has been a disappointment to all of us, but I think that it must have been particularly disappointing to you in the light of your long association. Forget it as fast as you can! I hope for John Lynch and Paul Haas, with whom I had a long talk, that they made a good deal.

Much more important is the satisfaction which we all feel with the good start-up of Texas Butadiene. We are all very much aware of the decisive part which you played in making it possible.

With best regards,

Sincerely,

/s/ MARK
Mark Millard

MJM.mjk